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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 317

ELISABETH WENNING GOEPP, Individually and as Administratrix of the goods, chattels and credits of RUDOLPH MAXIMILIAN GOEPP, Deceased,

Petitioner,

against

AMERICAN OVERSEAS AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

H. G. PICKERING,
40 Wall Street,
New York 5, N. Y.,
Counsel for Petitioner.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The above named Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled cause on July 14, 1953. (Upon remittitur to the Supreme Court of the State of New York, County of New York, also dated July 14, 1953, the judgment of the Court of Appeals was made the judgment of the Supreme Court of the State of New York, County of New York on July 31, 1953.)

The said judgment of the Court of Appeals affirmed the judgment (by a divided court) of the Appellate Division of the Supreme Court of the State of New York, First Department, which reversed a judgment of Trial Term of said Supreme Court. The judgment at Trial Term was entered on a verdict of a jury awarding damages in the sum of $65,000 for the death of a passenger (plaintiff's husband) sustained in the crash of an airplane engaged in an international flight.

The jury's verdict, in view of the Trial Court's careful, full and specific instructions, of necessity was predicated on its conclusion that on the evidence defendant was guilty of wilful misconduct which was the proximate cause of the crash, and therefore plaintiff's recovery was not limited to $8,300 under the Warsaw Convention (49 Stat. 3014) as claimed by the defendant (R. 17-21).

In affirming the judgment of the Appellate Division the said Court of Appeals nevertheless adjudged:

1. That the jury was foreclosed, by provisions of the Warsaw Convention (49 Stat. 3014) invoked by the defendant (R. 17-21), from awarding damages to the plaintiff in excess of $8,300;

2. That the evidence adduced by the plaintiff did not make a submissible case under Article 25 of the Convention, invoked by the plaintiff (R. 668; 672), which eliminates the $8,300 limitation if the damage is caused by the carrier's wilful misconduct;

3. That defendant's proven violations of the Civil Air Regulations did not constitute wilful misconduct under Article 25 of the Convention and were not the proximate cause of the plane crash;

4. That "the Trial Court should have granted defendant's motion [grounded upon a claimed immunity under the Warsaw Convention] to dismiss plaintiff's complaint in so far as there was any claim of liability in excess of $8,300"; and

5. That the judgment for the plaintiff in the sum of $65,000 and interest granted at Trial Term on the verdict of the jury, finding damages to the plaintiff in that amount, should be modified, by virtue of the provisions of the Warsaw Convention, by reducing the sum to $8,300.

Opinions Below.

The Supreme Court, Trial Term, rendered a memorandum decision (R. 692-693) which is reported in the New York Law Journal of January 7, 1952 at page 65. The opinion of the Appellate Division (R. 771-781) is reported, 281 App. Div. 105; and the dissenting opinion in the Appellate Division (R. 782-783) is reported, 281 App. Div. 112. There was no opinion in the Court of Appeals.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code, which provides for review by the United States Supreme Court by writ of certiorari of final judgments of the highest court of a State where any title, right, privilege or immunity is specially set up or claimed under a treaty of the United States.

The above described judgment of the Court of Appeals of the State of New York is a final judgment, and the Court of Appeals of the State of New York is the highest court of the State in which a decision in this case could be had.

In this action the Respondent specially set up and claimed certain rights, privileges and immunities under a treaty of the United States. For a defense to all of the causes of action set forth in Petitioner's complaint, Respondent in its answer claimed (R. 17-21) exemption from liability in

accordance with the "Convention for Unification of Certain Rights Relating to International Transportation by Air, and Additional Protocol", otherwise known as the Warsaw Convention, an international treaty to which the United States is an adherent (49 Stat. 3014). For a further defense Respondent pleaded (R. 20) that if held liable for failure to take necessary measures to avoid the damages claimed, a liability which Respondent admitted upon the trial (R. 770), the damages recoverable were limited in accordance with said Convention to $8,300 (R. 20).

Petitioner relied upon and claimed (R. 668; 672) the rights, privileges and immunities accorded by Article 25 of the Convention (49 Stat. 3020), which provides that "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct".

Petitioner proved that Respondent violated certain regulations of the Civil Aeronautics Board and one of its own, in that it failed to qualify the pilot in charge of the flight in accordance with such regulations.

At the close of Petitioner's case the Respondent moved to dismiss the complaint upon the ground that there was no proof of the proximate cause of the accident and no proof of any causal connection between any of the evidence adduced by the Petitioner and the destruction of the airplane (R. 362). The Trial Court reserved decision on this motion.

A similar motion was made at the close of the case on the specific ground that Petitioner had wholly failed to show that the accident was caused by wilful misconduct on

the part of Respondent within the meaning of that expression as used in Article 25 of the Convention (R. 656-657) and decision reserved.

The jury found that the accident was caused by the Respondent's wilful misconduct in failing to qualify the pilot for the route flown in accordance with the regulations of the Civil Aeronautics Board and its own regulations and awarded damages in the amount of $65,000. The Trial Court granted judgment on the verdict, holding that to disturb it "would constitute a usurpation of the jury's functions by the Court" (R. 693).

Respondent appealed from said judgment to the Appellate Division of the Supreme Court, First Department, contesting Petitioner's right to an award in excess of $8,300. On said appeal, the Appellate Division, two justices dissenting, held that there was no evidence to support the jury's finding that Respondent was guilty of any wilful misconduct "within the purview of the provisions of the Warsaw Convention" and no evidence that any violation of air safety regulations was the proximate cause of the accident (R. 780). The judgment of the Trial Court was modified by reducing Petitioner's damages from $65,000 to $8,300 (R. 781).

From that judgment of the Appellate Division, Petitioner appealed to the Court of Appeals, seeking to have the judgment of the Trial Court in the amount of $65,000 and interest reinstated on the ground that there was evidence in the record, both direct and circumstantial, to sustain the verdict of the jury that the accident was caused by the wilful misconduct of the Respondent within the purview of the provisions of the Warsaw Convention, and that "to disturb the verdict would constitute a usurpation of the jury's functions by the Court." The Court of Appeals,

without opinion, affirmed the judgment of the Appellate Division (R. 785-786).

The decision of the Court of Appeals denies Petitioner the rights, privileges and immunities accorded by Article 25 of the Convention and establishes an erroneous interpretation and application of the treaty.

Statement.

The action was brought to recover damages for the death of Mr. Goepp in the crash, at Stephenville, Newfoundland, of an airplane owned and operated by Respondent.

The flight, in the course of which the crash occurred, originated in New York on October 2, 1946. Its scheduled destination was Frankfort, Germany. Being an international flight, the action is subject to the so-called "Warsaw Convention", an international treaty to which the United States is an adherent (49 Stat. 3014).

The treaty limits the liability of an air carrier for the death of a passenger on an international flight to approximately $8,300 unless the death was "caused by his [the carrier's] wilful misconduct or by such default on his part, as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct" (R. 772-773).

The first leg of the flight was cleared over the route from New York, New York to Gander, Newfoundland, with Stephenville, Newfoundland designated as an alternate airport for the flight (Pl. Ex. 18, p. 700, In Ev., p. 295; Pl. Ex. 24, pp. 723-724, In Ev., p. 345). The route from New York to Gander was established as such on the application of the Respondent and the approval of the Civil Aeronautics Administration (Pl. Ex. 25, pp. 725-727, In Ev. p. 347).

The Respondent had applied for and had secured approval for the use of Harmon Field at Stephenville, Newfoundland, both as an alternate and as a refueling airport (Pl. Ex. 21, pp. 708-709, In Ev., p. 320).

The aircraft was piloted by Captain Westerfield (R. 60). Respondent claims that he was qualified on June 27, 1946 (R. 449).

Part 41 of the Civil Air Regulations, Section 41.3020 (Pl. Ex. 20, p. 703, In Ev., p. 317) provides that in order to qualify for a route a pilot shall have accomplished at least certain applicable procedures, namely, in the case of pilots such as Captain Westerfield who had at least 1000 hours of pilot experience: (1) shall have made, within the 12 months preceding his qualification two one-way trips over the route as pilot without passengers or as co-pilot with or without passengers; (2) shall have made one of such trips within the 60 days preceding the pilot's qualification in the company of a check pilot; and (3) shall have performed in flight, under actual or simulated instrument conditions, all of the approved instrument approach procedures at each regular, provisional and refueling and holding airport approved for the route.

Part 41 of the Regulations further provides in Section 41.3021(b) that "after an absence from the route of more than 12 consecutive months" the pilot must be "requalified in accordance with the appropriate provisions of §41.3020" (Pl. Ex. 20, pp. 704-705, In Ev., p. 317).

The evidence established, without contradiction, that Captain Westerfield had not made two one-way trips over the route from New York to Gander in any capacity within the 12 months prior to June 27, 1946; that he had not made one trip over the route from New York to Gander within 60 days of June 27, 1946 in the company of a check pilot; that he had not performed in flight, under actual or

simulated instrument conditions all of the approved approach procedures at Stephenville, Newfoundland, an approved refueling airport for the route; that from October, 1944 and until Captain Westerfield entered Respondent's employ in February, 1946, his flying was confined exclusively to Pacific Ocean areas; that he had not been into the Stephenville Airport since some time in 1944; and that his prior flying experience having been exclusively in the armed services, he had never qualified for any route in accordance with the Civil Air Regulations.

Respondent, baldly ignoring the Civil Aeronautics Regulations governing the route qualification of pilots, substituted for compliance therewith Captain Westerfield's prior experience as an Army pilot and a so-called "check flight" in March of 1946 from New York to Westover, Mass., to Goose Bay, Labrador, to Meeks Field, Iceland, to Prestwick, Scotland and on to Hanau, Germany, and return (R. 435-440). The "check flight" did not include either Gander or Stephenville.

In spite of this total disregard of the applicable safety regulations, Respondent dispatched Captain Westerfield on the flight in question. En route to Gander, the flight was diverted because of weather conditions to Stephenville, Newfoundland, where the plane landed on the afternoon of October 2nd.

Early on the morning of October 3rd, 1946, while it was still dark and the hills off to the northeast of the field were not visible, the plane prepared to take off (R. 61-62; 102; 112-113). It was directed by the control tower to take off on Runway 7 (R. 150-151), which headed in a northeasterly direction (R. 196).

A take-off from Runway 7 with a maximum load and in the dark was dangerous, according to the testimony of pilots who were familiar with it, because of the hills to the north-

east and the necessity for making a severe turn to the right to clear the terrain and climb out over the water (R. 112; 204; 253). The pilot had authority, in his discretion, to refuse to take off from Runway 7 (R. 61) and to await permission to take off from one of several available runways which led out over the ocean and were unobstructed (R. 195-196; Pl. Ex. 8, p. 695, In Ev., p. 95).

Captain Westerfield nevertheless accepted Runway 7 for the take-off and, omitting to make the right turn and climb out over the water, proceeded straight ahead in a northeasterly direction.

The plane carried slightly less than its maximum allowable weight (R. 39-40), and it was airworthy (Pl. Ex. 10, p. 697, In Ev., p. 198). It had been inspected and refueled prior to the take-off (R. 61). The pilot and co-pilot were in good health and good spirits (R. 119). Weather conditions were favorable (Def. Ex. A, p. 734, In Ev., p. 124). The take-off was normal (R. 107) and the airplane proceeded at a normal rate of climb (R. 108-109; 200-201; 245-247; 249-253; 293-294). One minute after the take-off the control tower was in communication with the plane by radio-telephone and there was no indication of any mechanical or other trouble (R. 45). One minute and a half thereafter the plane crashed against a hill seven miles northeast of the runway (R. 140) approximately 1200 feet high, at an elevation of 1160 feet (R. 62), and the 39 passengers and crew members perished (R. 59).

In the light of these facts Captain Westerfield's acquiescence in the control tower's direction to take off from Runway 7, his failure to make the right turn familiar to other pilots, or to accelerate his rate of climb, can be ascribed only to the fact that he was not familiar with or alerted to the obstructions ahead. Compliance by the Respondent with the Regulations of the Civil Aeronautics

Board, and with its own, would have familiarized him with and alerted him to the presence of such hills. The jury so found, and the evidence was more than ample to support its findings.

Of the jury's verdict, Mr. Justice Botein at Trial Term wrote:

> "Implicit in the jury's verdict was a finding that the Respondent was responsible for a violation of the Civil Air Regulations, constituting wilful misconduct under the provisions of the Warsaw Convention."

and again:

> "There was evidence in the record from which the jury could have found that the accident was the result of Captain Westerfield's lack of familiarity with conditions at the Stephenville Airport; and that the knowledge he lacked would have been supplied by qualifying procedures which conformed to the requirements of the Civil Air Regulations. In such event there was sufficient basis for the jury's finding that the violation of the regulation was the proximate cause of the decedent's death. Under such circumstances, the Court's appraisal of the evidence must yield to the jury's findings, and to disturb the verdict would constitute a usurpation of the jury's functions by the Court" (R. 692-693).

Mr. Justice Breitel's dissenting opinion in the Appellate Division was of like tenor. He wrote:

> "The jury could properly find that defendant's acts and omissions were 'wilful misconduct' within the meaning of the Warsaw Convention, it being sufficient that they find that defendant's acts or omissions were deliberately done or omitted as acts or omissions, in violation of the regulated standards of care. * * * On the matter of proximate cause it was quite reasonable

for the jury to find that the pilot's sub-standard familiarity with an instrument landing on the field at Stephenville involved of necessity a relatively sub-standard familiarity with the terrain, resulting in the pilot's ignorance of the hill which, on take-off, the plane struck. This, the jury could have found was a proximate cause of the accident. It should be obvious too that with respect to air accidents, because of the mysteries in which the fatal and more serious accidents become shrouded, a liberal approach in finding proximate cause from any kind of misconduct which may lead to multiple fatalities is socially justified, if not required. What may be required as evidence of proximate cause in a trolley-car accident would not be a relevant standard in an accident involving a modern transport plane, or the jet liner now at the threshold of air transportation. The risks of air transportation are great and are assumed by the passenger; but he should have the right to rely on the carrier's adherence to officially required standards of care. See Shawcross and Beaumont on Air Law, cit, *supra*, par. 343" (R. 782-783).

Treaty Involved.

"Convention and additional protocol between the United States of America and other powers relating to International Air Transportation. Concluded at Warsaw, October 12, 1929; adherence advised by the Senate, with reservation, June 15, 1934; adherence declared by the President, with reservation, June 27, 1934; declaration of adherence of the United States deposited at Warsaw, July 31, 1934; proclaimed, October 29, 1934" (49 Stat. 3000).

"ARTICLE 1.

"(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. * * *"

"(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. * * * " (49 Stat. 3014).

"ARTICLE 17.

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking" (49 Stat. 3018).

"ARTICLE 18.

"(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

"(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever" (49 Stat. 3019).

"ARTICLE 22.

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. * * * "

"(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

"(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger" (49 Stat. 3019).

"(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures" (49 Stat. 3019). [For the purposes of this case the sum of 125,000 francs has been converted into the round figure of $8,300; R. 685.]

"ARTICLE 25.

"(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

"(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment" (49 Stat. 3020).

Questions Presented.

1. Does uncontradicted evidence of a complete disregard of, and non-compliance with, specific air safety regulations of the Civil Aeronautics Board respecting pilot

route qualification for the route involved herein present a submissible case for the jury on the issue of wilful misconduct as that term is used in the Warsaw Convention?

2. May a State court of last resort in an action governed by a treaty of the United States (the Warsaw Convention) substitute its findings, deductions and conclusions from the evidence on the issue of wilful misconduct for the verdict reached by a jury and deprive Petitioner of a jury trial by directing a contrary verdict?

3. The jury having found that Respondent's wilful misconduct caused the fatal accident, a finding which relieved Petitioner from the limitation imposed by the Warsaw Convention on the amount of damages recoverable in the absence of wilful misconduct, may a State court of last resort substitute its appraisal of the evidence for the verdict of a jury and thereby deprive Petitioner of a jury trial?

4. In an action governed by a treaty of the United States (the Warsaw Convention) was the evidence adduced at the trial sufficient to make a submissible case for the jury on the issue of wilful misconduct as that term is used in that treaty?

Specification of Errors to be Urged.

The Court of Appeals of the State of New York erred:

1. In holding that Petitioner did not make a submissible case for the jury on the issues of wilful misconduct and proximate cause;

2. In holding that the record disclosed nothing upon which to justify a holding of wilful misconduct on defendant's part (R. 778);

3. In holding that the failure of the defendant to comply with the air safety regulations of the Civil Aeronautics Board did not constitute wilful misconduct within the provisions of Article 25 of the Warsaw Convention (R. 778-779);

4. In holding that the record disclosed nothing upon which to justify a holding of any causal connection between the accident and any possible violation of regulations (R. 778);

5. In holding that there was no evidence submitted to show that if there were any violations of any air safety regulations such violations were the proximate cause of the accident, or that defendant was guilty of any wilful misconduct within the purview of the provisions of the Warsaw Convention (R. 780);

6. In holding that the jury was foreclosed by provisions of the Warsaw Convention from awarding damages in excess of $8,300;

7. In holding that the evidence adduced by the plaintiff did not make a submissible case for the jury under Article 25 of the Convention;

8. In holding that "The trial court should have granted defendant's motion to dismiss plaintiff's complaint in so far as there was any claim of liability in excess of $8,300" (R. 780); and

9. In holding that the judgment in plaintiff's favor in the sum of $66,005.49 should be modified and a judgment directed in plaintiff's favor in the sum of $8,300 without costs (R. 781);

all of which it held, ordered and adjudged by its affirmance without opinion (R. 785-786) of the decision and judgment herein of the Appellate Division of the Supreme Court, First Department (R. 771-781).

Reasons for Granting the Writ.

1. The Court of Appeals of the State of New York has decided a Federal question of substance not heretofore determined by this Court.

2. The Federal question arises under a treaty of the United States. Under the supremacy clause of the Constitution, Article VI, this Court is charged with the duty of insuring the treaty's authority in State courts. Only by a uniform Federal rule as to what constitutes a submissible case for the jury on the issue of "wilful misconduct" under the Warsaw Convention may litigants pursuing rights subject to such treaty and asserting immunities and privileges thereunder receive similar treatment in all State courts.

3. The jury having found that the carrier "was responsible for a violation of the Civil Air Regulations, constituting wilful misconduct under the provisions of the Warsaw Convention" and that such misconduct was the proximate cause of decedent's death (R. 692) and the Court of Appeals having affirmed the decision of the Appellate Division that "The trial court should have granted defendant's motion to dismiss plaintiff's complaint in so far as there was any claim of liability in excess of $8,300" (R. 780), and having modified the judgment accordingly, it is important that this Court determine whether the jury function in passing on these disputed questions of fact and in drawing inferences from proven facts has been respected.

4. It is important that this Court provide guidance to the courts and to the members of the bar with respect to the question of what constitutes a submissible case for the jury

on the issues of wilful misconduct and proximate cause under the Warsaw Convention.

5. It is important that this Court preserve for litigants their right to a jury trial of issues arising under the Warsaw Convention.

6. While this Court has not heretofore spoken on these important Federal questions it is believed that the decision of the New York Court of Appeals is in conflict with decisions of this Court in cognate cases which are cited in the accompanying brief.

7. Since the Warsaw Convention governs actions for damages for injury to the person or property of passengers as well as for death, the questions presented are of general public interest affecting as they do the substantial rights of innumerable citizens of the United States who travel on international flights, and will frequently be litigated in the divers courts of the several States.

8. The United States Government has a substantial interest in the resolution of these Federal questions by this Court as well as a substantial stake in the case at bar. The Federal Employees' Compensation Act (Title 5 U. S. C. Chapter 15) provides for compensation for employees of the United States who are injured in the performance of their duties and for compensation to their families in the event of death. Where a right of action for such injury or death lies against a third person, the United States is subrogated to such right of action to the extent of reimbursement out of any damages recovered for compensation previously paid and compensation thereafter to accrue to the employee or his survivors (§§776, 777). Innumerable

employees of the United States are constantly being dispatched on international flights in the discharge of their duties and subjected to the hazards inherent in that mode of travel.

9. In the instant case Mr. Goepp, the decedent, at the request of the Department of Commerce was acting in the capacity of scientific consultant without compensation for the Office of Technical Services, Technical Industrial Intelligence Division. Subsequent to his death, Congress enacted Private Law 452—80th Congress, Chapter 801—Second Session, which provided that Mr. Goepp "shall be deemed to have been a civil employee of the United States within the purview of said Act [Title 5 U. S. C. Chapter 15], at the time of his death, and compensation for death payable under said Act shall accrue from date of his death and shall be payable to such of his dependents as may qualify under Section 10 of said Act * * *". Out of any moneys recovered in this action the United States is entitled to be reimbursed for compensation paid and to be paid in an amount in excess of $20,000.

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

H. G. Pickering,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

The Warsaw Convention is a treaty of the United States within the scope of Title 28 U. S. C. 1257(3). *Altman & Co.* v. *United States,* 224 U. S. 583, 600-601. The questions presented are concerned with the construction and application of such treaty and the protection of rights, privileges and immunities which it accords. The judgment of the Court of Appeals of the State of New York on these issues is one which this Court is specifically authorized to review. Title 28 U. S. C. 1257(3).

The construction, application and effect of treaties of the United States are peculiarly within the province of this Court. *Carpenter* v. *Shaw,* 280 U. S. 363, 367-368; *Palmer* v. *Hussey,* 119 U. S. 96; *Jordan* v. *Tashiro,* 278 U. S. 123; *Nielsen* v. *Johnson,* 279 U. S. 47; *Todok* v. *Union State Bank,* 281 U. S. 449; *Santovincenzo* v. *Egan,* 284 U. S. 30.

The question whether "wilful misconduct" as used in the Warsaw Convention embraces within its scope the violation of the applicable air safety regulations of the Civil Aeronautics Board, as the jury found, is a Federal question of major importance which is within the province of this Court to decide and which ought to be decided by it.

II.

In writing of treaties, in *Head Money Cases,* 112 U. S. 580, at page 598, the court said:

> "The Constitution of the United States places such provisions as these in the same category as

> other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. * * * "

The treaty being the law of the land "as an act of Congress is", the right to recover damages occasioned by the wilful misconduct of the carrier, as provided therein, is a Federal right.

This Court repeatedly has held, notably in cases arising under the Federal Employers' Liability Act, that the question of the sufficiency of the evidence to support a finding of a Federal right to recover is a Federal question. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479.

Among the reasons assigned by the Court for granting writs of certiorari in such cases are the following: The importance of preserving for litigants their right to a jury trial, because however narrow the conflict in the evidence it is for the jury, not the court, to resolve the conflict (*Wilkerson* v. *McCarthy*, 336 U. S. 53, 55, 60); to determine whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected (id., concurring opinion, 70-71); the desirability of achieving uniformity in the adjudication of Federally created rights by protecting them from over-exacting local requirements (*Brown* v. *Western R. of Alabama*, 338 U. S. 294, 299); the desirability of preventing the law from becoming clouded and confused (*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 73, concurring opinion); the appropriateness of leaving to the jury issues upon which

fair-minded men might reach different conclusions (*Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 353); to avoid depriving litigants of their right to a jury trial (*Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35); to prevent the invasion of the jury's historic function which results when parties are permitted to relitigate factual disputes in the reviewing court (*Lavender* v. *Kurn*, 327 U. S. 645, 652-653).

See also: *Jenkins* v. *Kurn*, 313 U. S. 256; *Seago Adm'x.* v. *New York Central Railroad Co.*, 315 U. S. 781; *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649; *Coray* v. *Southern Pacific Co.*, 335 U. S. 520; and *Stone* v. *New York C. & St. L. R. Co.*, 344 U. S. 407.

Underlying these decisions is the thesis enunciated by Mr. Justice Holmes in *Aikens* v. *Wisconsin*, 195 U. S. 194, 206, and quoted in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 63, as follows:

> "But it must be assumed that the constitutional tribunal [the jury] does its duty and finds facts only because they are proved."

III.

From the foregoing decisions of this Court it appears that the Petition for a writ of certiorari in this cause should be granted.

Respectfully submitted,

H. G. Pickering,
Counsel for Petitioner.